

University of Montana

ScholarWorks at University of Montana

Faculty Journal Articles & Other Writings

Faculty Publications

2002

The Case against Montana's Anti-Stacking Statute

Greg Munro

University of Montana School of Law, greg.munro@umontana.edu

Follow this and additional works at: https://scholarworks.umt.edu/faculty_barjournals



Part of the [Insurance Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Munro, Greg, "The Case against Montana's Anti-Stacking Statute" (2002). *Faculty Journal Articles & Other Writings*. 20.

https://scholarworks.umt.edu/faculty_barjournals/20

This Article is brought to you for free and open access by the Faculty Publications at ScholarWorks at University of Montana. It has been accepted for inclusion in Faculty Journal Articles & Other Writings by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

INSURANCE CONSUMER COUNSEL'S COLUMN

THE CASE AGAINST MONTANA'S ANTI-STACKING STATUTE

BY PROFESSOR GREG MUNRO

It would be hard to identify a larger loss to insurance consumers in Montana than that dealt the public the day the 1997 Legislature passed the "anti-stacking" bill¹ now codified as MCA §33-23-203 and known as the "anti-stacking statute." When that law took effect, families with four cars suddenly had one-quarter of the automobile UM, UIM, and Med Pay coverages they had before the effective date but still paid the same premiums.

Before the 1997 statute, consumers in Montana could stack their auto insurance when they paid premiums for coverage on more than one car. The Supreme Court had been doing so since 1972 when it stacked UM coverages from different carriers in *Sullivan v. Doe*.² In *Kemp v. Allstate Ins. Co.*,³ in 1979, the court established that you could stack multiple UM coverages

under separate policies with the same company, and in *Chaffee v. U.S. Fid. & Guar. Co.*,⁴ held you could stack coverage for multiple cars under the same policy.

When the insurance industry secured passage of the first "anti-stacking" bill⁵ in 1981, it only blocked stacking where multiple vehicles were insured under the same policy. The 1981 statute was later held, in *Farmers Alliance Mut. Ins. Co. v. Holeman*,⁶ to apply only to compulsory coverages of Bodily Injury Liability and Uninsured Motorist. The statute did not block stacking of Medical Pay coverage and Underinsured Motorist coverage.

It is important to note the different choices auto insurers made when covering multiple vehicles in Montana in the years after the 1981 statute took effect. State Farm placed an insured's multiple vehicles

under separate policies and collected separate premiums, while Farmers Insurance Company placed an insured's multiple vehicles under the same policy collecting separate premiums. On the other hand, USF&G and Allstate placed multiple vehicles under the same policy but reportedly charged a single premium for UM coverage. USF&G and Allstate heeded the court's oft repeated reasoning that if the insurer charged multiple premiums, the insured would be entitled to multiple coverages. On the other end of the marketing spectrum, State Farm continued to charge multiple premiums and never sought the benefit of the 1981 anti-stacking statute, since it placed each vehicle under a separate policy, a practice to which the statute did not apply.⁷

It was in the context of this roughly two-decade stacking history

Enter Expert Name: **John Smith**

(12) Depositions, (4) Name Appears in Document,
(13) Similar Searches, (2) Posts by Other Lawyers,
(1) Hot Tips, (22) ListServ Messages, (1) Complaint
(1) Brief, (22) Verdicts, (1) Other Documents

MTLA may have the documents you need!

TRIALSMITH

Search Free at TrialSmith.com 800.443.1757

Formerly DepoConnect.com. A member service of Montana Trial Lawyers Association.

that the 1997 Legislature mandated that regardless of the number of policies issued, the number of vehicles insured or the number of premiums paid, coverages could not be stacked to provide the consumer any benefit for the additional premiums they were charged for multiple vehicles. The legislature's act would

prove to have a catastrophic impact on families of those maimed and killed in auto accidents in Montana. Without a doubt, the 1997 anti-stacking statute is the number one problem faced by plaintiffs' counsel in Montana in attempting to secure adequate compensation for clients' injuries arising out of the operation of automobiles. By May of 1998, the last of the stackable policies expired and it was counsel's job to tell families of those who suffered severe injury or death in auto accidents and owned multiple vehicles that only a fraction of the coverage for which they paid was available to compensate them.

The brutal economics of the 1997 anti-stacking statute, which prohibits consumers from obtaining the benefit of multiple coverages for which they paid while allowing insurers a windfall by permitting them to collect multiple and ever-increasing premiums for no coverage, compelled counsel to attack the statute. In the last three years, many members of the Montana Trial Lawyers Association have filed challenges to the statute and its application. The most frequent questions I field today are: What is happening to the anti-stacking statute? Is there anything filed at the Supreme Court? Have any district court decisions come down? What are lawyers arguing in the attacks on the statute? What are the best challenges?

Consequently, using MTLA's listserv, I invited members to inform me of their stacking cases and send copies of their briefs, and sev-

eral members did so. In this article, I will give a status report on those cases that have been reported as being filed and briefed. I will then set out a synopsis of arguments that have been developed by MTLA members. Please note that this is a compendium of those cases reported to me, and there

Copies of the briefs referenced in this article are available on MTLA's website at www.monttla.com

are bound to be others about which I am uninformed or have forgotten because they were reported to me orally at MTLA seminars. Because of space limitations, I will not treat opposing arguments or the non-stacking issues such as offsets that are argued in our members' briefs. I want the writers of these fine briefs to know how difficult I found the task of selecting, synthesizing, accurately digesting, and appropriately attributing these arguments given our space limitations. I hope they will forgive me if aggrieved by my many attempts to abridge their fine efforts to meet space considerations here. Finally, I have selected only the arguments that appear to me to be viable for development. I have not included or commented on other fine arguments that are fact specific or made in difficult fact situations.

STATUS OF REPORTED STACKING CASES FILED AND BRIEFED

Cameron v. State Farm Ins. Co., (Summary judgment decision pending) MTLA member Joe Bottomly, Eleventh Judicial District, Flathead County Cause No. DV-99-250 (B).

Charles Cameron and his wife, Cindy, insured separate vehicles under separate State Farm policies. Cindy Cameron was killed, while Charles and his infant son Daniel suffered serious injuries in a head-on collision of

two Ford Explorers near Ovando, Montana on November 28, 1998. State Farm refused to stack the UM, UIM, or Med Pay coverages of Charles's pickup truck, which was not involved in the accident. Joe Bottomly filed and briefed the case on summary judgment. The brief is

excellent containing many well-developed arguments that will be the basis of much that follows. Unfortunately, the case has languished with-

out decision in Flathead County for over 18 months. Bottomly's brief will be placed on the MTLA website.

Farmers Alliance Mut. V. Hancock, (Settled) Fifteenth Judicial District, Sheridan County, Cause 10913. MTLA members Gene Jarussi and Russ Plath, along with lawyers Laura Christofferson and Loren Toole all filed briefs in support of motions to stack.

This was a head-on collision on June 25, 1998, in which an SUV driven by Marilyn Smith crossed the centerline north of Medicine Lake, Montana colliding with a car carrying five young baseball players on their way to a baseball tournament. Two baseball players were killed and three severely injured. For separate premiums and under the same policy, Farmers Alliance Mutual covered the car in which the five were riding and a separate car for \$300,000 UIM limits. Farmers Alliance sued for declaration that they only owed one coverage and moved for summary judgment. Judge Cybulski ruled in favor of the insureds and stacked the coverages ruling that the insurer's anti-stacking limitation of liability clause was not a "reasonable limitation" as required by the statute. The carrier appealed to the Montana Supreme Court, and the case was settled before briefing there.

Goroski v. Highlands Ins. Group and Northwestern National Casualty Company, (Settled) MTLA Member Gary Zadick, Seventh Judicial District, Wibaux County, Cause No. DV-10.

Lawrence Goroski was killed while a passenger in a single-car accident. Goroski had eight separate vehicles covered under a single policy for which he paid eight separate premiums for UIM and Med Pay coverage. Gary Zadick sued to stack the coverages. Subsequently, Gary drafted and showed to the carrier an excellent brief on motion for summary judgment after which the case settled without filing the brief. Again, I have cited extensively from his brief but urge members to read the entire brief, posted on the MTLA website, along with the other fine stacking briefs posted there for the members' benefit.

Hardy v. Progressive Specialty Ins. Co., (Summary judgment decision pending) MTLA member Kent Duckworth. Federal District Court, Missoula Division [Molloy], Cause No. CV-01-130-M-DWM.

Progressive charged the severely injured insured three separate premiums for 50,000 UIM limits for each of three separate vehicles insured under the same policy. When the company refused to stack the UIM coverages, Kent filed suit and moved for summary judgment.

Filban v. USAA Casualty Ins. Co. (Summary judgment decision pending) MTLA member Cathy Lewis. Eighth Judicial District, Cascade County, No. ADV 01-836. [McKittrick]

Filban and Scoggins were killed in a head-on collision with Maki, who was headed the wrong way on I-15 at Hardy, Montana. Filban had three vehicles under one USAA policy with three separate premiums for UIM and for Med Pay coverage, which also included

seatbelt/airbag and death benefits. Lewis sued the carrier and briefed cross-motions for summary judgment.

Mitchell v. State Farm Ins. Co., (Decision pending) MTLA member Steve Fletcher, Montana Supreme Court No. 02-052.

Charles Mitchell was severely injured as a passenger in a single car accident in Montana on January 27, 1998. He covered five vehicles under separate State Farm policies issued in California and paid separate premiums for UM and UIM coverage. The Fourth Judicial District court in Missoula County applied California law in spite of the **Kemp v. Allstate Ins. Co.**⁸ and **Youngblood v. American States Ins. Co.**⁹ decisions and upheld the carrier's definition of UIM to find no coverage. California has an anti-stacking statute and a statutory definition of UIM that defeats the coverage entirely in many cases. The case is on appeal to the Montana Supreme Court and under review by the Amicus Committee of MTLA.

Other cases: Doug Marshall told me some time ago that he was briefing a case filed in the Butte Division of the Montana Federal District Court. He was planning attacks on the statute for separation of powers, impairment of contractual obligations, denial of equal protection and substantive due process. Mick McKeon reported having a stacking case against Progressive. Dan Bidegaray indicated last April that he and Mike Cok were pressing to stack Med Pay limits in a State Farm case. He said Mike George was also pressing a stacking case at that time. Larry Grubbs reported he was filing suit in a case seeking to stack GEICO policy UM and Med Pay limits. He said his partner, Mike Eiselein, was also handling a stacking case. Dale McGarvey indicated many months ago that he had six cases involving stacking and was

fast tracking one case in particular. I believe Alan Lerner has one or more cases going and, in July, Roland Duchrocher reported he was pursuing a case involving stacking of UM and Med Pay coverage on four State Farm policies. Richard Ramler argued a stacking case before Judge Guenther in Gallatin County in December. He said he incorporated substantial portions of Joe Bottomly's brief. Finally, Gary Rice reported working on a stacking case involving Farmers Insurance Company. I do not know the present status of these cases but report them for networking purposes.

THE ARGUMENTS FOR STACKING

Cathy Lewis, in her brief in the **Filban** case, provides a thorough history of stacking coverages in Montana, especially noting that the Montana courts have an unbroken chain of public policy statements in regard to assuring coverage for which the insured paid a separate premium. This historical context is important for the arguments that follow.

Argument: The carrier failed to "clearly inform or notify the insured in writing of the limits of the coverage with respect to the premium charged" as required in MCA § 33-23-203 (3).

Gary Zadick, in **Goroski**, asserts that before the 1997 anti-stacking statute, Montana cases made clear that stacking of portable coverages, UM, UIM, and Med Pay, was the "benefit of the bargain" for auto insurance consumers. Insurers knew that anti-stacking language in "limits of liability" clauses in their policies was invalid by reason of public policy in the state. Because the statute changed the benefits, the legislature recognized the importance of notice to the insureds. Accordingly, subsection (3) of the 1997 anti-stacking statute required the insurers to "notify the insured in writ-

ing of the limits of the coverage with respect to the premium charged."

Zadick in *Goroski* argued: "Defendant insurer failed to give notice to the insured that for the same premium charged on each of eight vehicles, the insurer was only going to extend one single underinsured limit and one single medical expense limit. The failure to give the notice is contrary to the above-quoted statute and invalidates the attempted renewal on less favorable terms." Zadick argues this was critical in light of the previous public policy statements in *Bennett v. State Farm Mut. Auto. Ins. Co.*,¹⁰ *Ruckdashchel v. State Farm Mut. Auto. Ins. Co.*,¹¹ *Farmers Alliance Mutual v. Holeman*,¹² and *Grier v. Nationwide Mut. Ins. Co.*¹³ that separate benefits be provided when separate premiums are charged. Lewis similarly argued that those cases gave rise to the customer's "reasonable expectation" that the coverage could be stacked increasing the need for notice.

Zadick also bases his notice argument on MCA § 33-15-1106, which requires insurers to give 30-day notice before a policy term expires of any change by which the policy will be renewed "on less favorable terms." That the coverages could not now be stacked was clearly a less favorable term in October of 1997. The court in *Thomas v. Northwestern Natl. Ins. Co.*¹⁴ indicated that insurance consumers expect the same coverage upon renewal unless they are given conspicuous notification of change. Furthermore, the court, in *Thomas*, held that insurance consumers were not obligated to read the renewal policy. Failure to give appropriate notice estopps the carrier from denying the benefits.

Joe Bottomly similarly argues that the carrier must give notice that the limits of coverage with respect to the premium charged will

be \$0.00 for each additional policy where the carrier intends to block stacking of coverage. Instead, the declarations pages lead the consumer to believe full limits of each coverage are available for each premium. As Bottomly's brief says, if "the premiums Charles paid for UM and UIM coverage entitled him to nothing [for the additional coverages], then he should have been so informed. He was not." Additionally, the brief points out that *Bennett v. State Farm*¹⁵ held that the insurer's basic insuring agreement "unambiguously provides an insured a reasonable expectation to recover damages up to the limit of both policies under which she was an insured and for which separate premiums had been paid."

Argument: A policy provision blocking stacking of UM coverage is void as a violation of MCA § 33-23-201.

Bottomly, in *Cameron* argues that, if the carrier is blocking stacking of UM coverage by using a family exclusion, then that exclusion violates the UM statute MCA § 33-23-201. The Montana Supreme Court treats UM coverage as a compulsory coverage required by statute,¹⁶ so that it cannot be diminished below the statutory minimum by a policy provision.

Argument: The carrier failed to inform the insured "whether the coverage from one policy or motor vehicle may be added to the coverage of another policy or motor vehicle" as required in MCA § 33-23-203 (3).

Bottomly, in *Cameron*, dissects the notice sent by State Farm to show that it really doesn't give the statutory notice required but instead, refers back to the policy language which is in fact an exclusion (family), not an anti-stacking provision. Jarussi, in *Hancock*, argues that the purported notice given by Farmer's Alliance Mutual that cov-

erages for UM, UIM, and Med Pay could not be stacked could be read by the consumer to mean that he could not add his UM, UIM, and Med Pay coverage under the same policy. He cites additional conflicting interpretations and concludes that the notice is deficient under the statute.

Argument: A policy provision restricting coverage to only one limit where multiple premiums have been paid is not a "reasonable limitation" authorized by the statute.

This argument was advanced by Gene Jarussi in *Hancock*. He contended that UM and UIM coverages, being portable like life insurance, are personal and follow the insured regardless of whether he is a pedestrian, passenger, or driver at the time of the accident. To allow the insured to buy multiple coverages, pay multiple premiums and then, by "limitation of liability" provision, restrict him to one limit is not a "reasonable limit" as allowed by the statute.

Judge Cybulski so ruled in *Farmers Alliance Mutual v. Hancock*¹⁷ on September 8, 2000. Gary Zadick and Cathy Lewis also argue this point in their briefs relying on Cybulski's decision. Kent Duckworth makes the same argument in *Hardy v. Progressive*.

Argument: The insurer simply gave no notice

This is an argument fact specific to each case. Laura Christoffer-son, briefing on behalf of the insured, Daniel Olson, in the *Hancock* case argued, after review of the facts, that the insurer simply gave no notice. With regard to the insurer's purported notice, she said:

This notice is not directed to Mr. Olson specifically, does not state what the limits of the coverage are or were with regard to his vehicles, what the premium is nor does it

clearly define what effect this change may have upon Mr. Olson. There is no indication when the notice was sent or that Mr. Olson even received or whether it was actually sent to him.

Christofferson noted that shortly after the enactment of the statute there were policy renewals to which the statute applied with no notice given the insured so he could increase his limits for his protection if he chose.

Argument: A policy contract that requires multiple premiums for multiple coverages but restricts the benefit to a single limit is unconscionable.

Zadick asserts that the Court in *Leibrand v. National Farmers Union Prop. & Cas.*¹⁸ indicated that the unconscionability doctrine of the Uniform Commercial Code can be applied to insurance policy contracts. He says the two-fold test for unconscionability is (1) contractual terms unreasonably favorable to the drafter and (2) no meaningful choice on the part of the other party regarding acceptance of the provision. Zadick contends that policies providing for multiple premiums and restricting benefits to a single limit meet this test. Note that this argument avoids getting tangled in or challenging the statute.

Similarly, Lewis cites the 9th Circuit's decision upholding Judge Molloy's finding of unconscionability in *Ticknor v. Choice Hotels, Int'l, Inc.*¹⁹ for the proposition that, in Montana, it requires "a finding that the contract: 1) was one of adhesion; 2) was not within the weaker party's reasonable expectations, or 3) if within its expectations, it was unduly oppressive, unconscionable or against public policy." She builds her argument on insurance standardized forms, take-it-or-leave-it offers, unequal bargaining position, and the insured's

reasonable expectations to argue that anti-stacking contracts are unconscionable if the insurer collects multiple premiums.

Argument: Policies providing multiple coverages for separate premiums but restricting benefits to a single limit should be reformed by the court in equity.

Zadick, in *Goroski*, notes that MCA § 28-2-1611 gives a court the power to reform a contract "due to mutual mistake, unilateral mistake, or fraud." He notes that the insurers continued to charge multiple premiums when they had "presumably made a corporate decision to no longer stack benefits." The multiple premiums paid were consideration for an aggregate limit, and a similar premium had been charged in previous years for limits that could be stacked. It is unlikely that the insured wanted or expected a reduction to a fraction of his former coverage for the same premium. Zadick argues that these facts at most establish fraud and, at least, establish unilateral mistake. Hence, he submits that the contract should be reformed to provide a single premium and a single aggregate limit of liability. One can argue that this approach does not seek to stack but only to reform the contract, so that it is not in derogation of the anti-stacking statute.

Argument: The policy doesn't really prohibit stacking and, therefore, falls under the "provides otherwise" exception to the anti-stacking statute.

Lewis, in the *Filban* case, argues that careful reading of USAA's "limit of liability" clause shows it does not actually block stacking. The anti-stacking statute starts with this exception: "Unless a motor vehicle liability policy specifically provides otherwise. . . ." If the policy doesn't block stacking, then it "provides otherwise" and the statute doesn't apply. Similarly, Gene Ja-

rusi argues in *Hancock* that Farmers Alliance Mutual's limit of liability clause doesn't actually preclude stacking of UIM coverage so that it falls in the exception created by the statute. In several of the cases filed, counsel have carefully studied the offending provisions to see if they are ambiguous, don't apply, or don't on their face do what the insurer thinks they do. The arguments are too specific and voluminous to cover here. Suffice it to say that such careful analysis needs to be part of each challenge. I note that Lewis has a good section on court construction of ambiguity in her brief as do Zadick and Duckworth.

Argument: The anti-stacking statute is unconstitutional for violation of separation of powers.

Bottomly argues the statute "interferes with the proper separation of powers between the court and the legislature. He says the legislature's mandate that "the limits of insurance coverage available under each part of the policy must be determined as follows . . ." requires a specific interpretation of the contract and usurps the power of the court to interpret contracts thereby violating Art. VII, § 1, which vests all judicial power of the state in the courts. That section also forbids persons "charged with the exercise of power properly belonging to one branch" to exercise "any power properly belonging to either of the others . . ." Gary Zadick, in the *Goroski* brief doesn't raise constitutional challenges but makes a great statement of the court's role in interpreting contracts.

Argument: The anti-stacking statute is unconstitutional for violation of equal protection.

Bottomly argues the statute violates equal protection of Art. II, § 4, because the statute treats similarly situated individuals (those who bought identical coverages) differently. He notes that, under the stat-

ute, the amount of UM or UIM coverage the insured actually gets depends on the coverage of the car involved in the accident and not the insurance the insured purchased. He argues as follows: The court must apply a compelling state interest test for constitutionality. One of the "inalienable rights" in Art. II, § 3 is the right to pursue life's necessities, and insurance benefits are a necessity, making securing the benefits of insurance a fundamental right requiring a compelling state interest to make the statute valid. Even if the statute does not affect a fundamental interest, it must pass the rational basis test, which it cannot do. Bottomly compares *Heisler v. Hines Motor Co.*,²⁰ which found violation of equal protection where one class of insureds had the right to choose a treating physician while another created by the statute did not. The court there held reducing costs of

insurance to be an illegitimate purpose for the statute.

I submit that another avenue to argue denial of equal protection is to compare that class of insurance consumers who buy all of the personal portable life insurance they wish and are secure in the benefits, with that class that similarly purchases all the UM, UIM, and Med Pay personal portable auto insurance they wish. The anti-stacking statute deprives the latter class of the benefit of all but one policy coverage.

Argument: The anti-stacking statute is unconstitutional for violation of inalienable right to protect property and pursue life's necessities.

Bottomly's brief cites Art. II, § 3, for its "inalienable rights" which include "the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, ac-

quiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." It argues that securing insurance benefits is such a right, which the statute abrogates without compelling interest or even a rational basis. As the argument is developed, "The statute unilaterally prevents a person from recovering damages to himself and his family for which he has paid. It thereby impairs the individual's right to protect these inalienable rights."

Argument: The anti-stacking statute is unconstitutional for violation of substantive due process.

Bottomly bases this argument on Art. II, § 17's guarantee of due process of law. In *Newville v. State Dept. of Family Services*²¹ and *Plumb v. Fourth Judicial District*,²² the Montana Supreme Court developed the test that re-



We're Growing With You!

We publish data - do you have information you'd like printed, put on a CD and/or the Internet?

- ★ We've perfected a system for taking data in your format and transforming it into other formats for publication
- ★ Let us give you an estimate for your project.

Call 449-8889 or 800-816-0636 for more information.

PRINTED PRODUCTS

- ▶ Montana Reports
- ▶ State Reporter Advance Sheets
- ▶ State Reporter of Education Law (Edlaw)
- ▶ Rules of Practice and Procedure for Montana Courts (2 Volumes plus CD)
- ▶ Parallel Citations Tables - The Montana Green Book
- ▶ Fort Peck Comprehensive Code of Justice

CD PRODUCTS

- ▶ The ARMs • ARMs Plus MCA
- ▶ Montana Reports • MR Plus Bankruptcy or MR Plus Workers' Compensation
- ▶ Trio CD • Trio Plus Bankruptcy or Trio Plus Workers' Compensation
- ▶ Federal Courts • State Courts/Agencies • Court Rules
- ▶ Tribal Codes and Opinions • Fed/State Combination
- ▶ Design Your Own CD with ANY database from Montlaw

ON-LINE PRODUCTS

- ▶ Montlaw on the Internet
- ▶ State Reporter On-Line
- ▶ My Montlaw - Customized for your Firm/Organization

CLASSES

- ▶ Hands-On Internet Legal Research (2 CLE)
- ▶ Hands-On Internet Marketing for Law Firms (2 CLE)

See our web site for more information:

<http://www.statereporter.com>

strictions placed on remedies and procedures must be reasonable when balanced against the purpose of the legislature in enacting the statute. The means chosen by the legislature must be reasonably related to the result sought. The statute here is an unreasonable restriction not rationally related to a legitimate government purpose.

Argument: The anti-stacking statute is unconstitutional for violation of the right to full legal redress.

Bottomly argues that Art. II, §16 provides a right to "full legal redress" which the court found to be fundamental in *Pfost v. State*.²³ Though it later held the right was not fundamental in *Meech v. Hill Haven West, Inc.*,²⁴ he argues that subsequent to *Meech*, in *Wadsworth v. State*²⁵ and *MEIC v. Dept. of Environmental Quality*,²⁶ the court again indicates that rights found in the Declaration of Rights of the Montana Constitution are "fundamental." From this he argues that the statute violates a fundamental right of legal redress by depriving the insured of his or her right to have the courts interpret the insurance contract on issues of stacking.

The Bottomly brief integrates the constitutional issues described above into a single argument, but each constitutional violation is well addressed.

Argument: The anti-stacking statute is unconstitutional because it impairs the obligation of contracts.

Loren Toole in *Hancock* cites Art. II, § 33 for the proposition that "No. . . law impairing the obligation of contracts. . . shall be passed by the legislature." He argues that the legislature has attempted to create a "limitation of liability under motor vehicle liability policy" and has thereby impaired the contracts. The statute's drafters tried to avoid

this impairment by not applying the anti-stacking provisions to then existing policy contracts during their terms.

I suggest that the argument that the anti-stacking statute impairs contracts should be bolstered by arguing further that auto insurance is marketed in the form of automatically renewable contracts. All the consumer does is continue to pay premiums on the same periodic basis and the contract is renewed without any further application, disclosures or signatures. (This should be the subject of judicial notice.) This was implicitly recognized in *Thomas v. Northwestern National Ins. Co.*²⁷ in which the court noted that the consumer assumes the contract is being renewed on the same terms and doesn't even have a duty to read the renewal policy. Prior to the effective date of the anti-stacking contract, these ongoing renewable contracts were governed by Montana case law that allowed the consumer the benefit of receiving the limit of UM, UIM, or Med Pay coverage for each vehicle for which she had paid a premium. Even after the 1981 anti-stacking statute blocked stacking for multiple autos insured under the same policy, companies like State Farm still freely chose to place their insured's vehicles under separate renewable policy contracts and charge separate premiums. They continued to do so even after the Montana Supreme Court ruled such practices rendered their contract benefits stackable. In this context of renewable continuing policy contracts that provided for multiple premiums and multiple recoveries, the legislature passed a statute mandating that all such contracts would be interpreted to provide only a single limit where the insured paid multiple premiums. This is the unconstitutional impairment of the contracts.

Argument: If the insurer collects multiple premiums when the

statute and the policy say there can be no multiple benefits, then the insurer should be equitably estopped from refusing the full stacked benefits.

Steve Fletcher in one section of his brief in the *Mitchell* case at the Montana Supreme Court, makes an intriguing alternative argument. If the language of the statute and the policy contract prohibiting multiple coverages is valid, then the carrier's act of charging multiple premiums should be an unlawful act. Steve argues that the carrier who does so should be estopped from denying benefits. This line of argument merits further development because one could avoid challenging the statute or policy provisions and even base the argument on assumed-for-the-sake-of-argument validity.

Argument: The anti-stacking statute only applies to prevent stacking "to prevent payments for the same element of loss.

Pat Sheehy would add this argument, which he points out "allows the court to interpret the anti-stacking statute according to its terms." He argues that the overarching intent and purpose of the statute, "to prevent duplicate payments for the same element of loss," is stated in subsection (2). Sheehy says: "The legislature was passing the anti-stacking statute to prevent people from buying multiple coverages and then collecting twice for medical bills or other losses from the same claim." He concludes, the statute should not apply when the damages of the insured far exceed any single limit under any single coverage. Then, it is important that the insureds get the stacked coverage they paid for to cover all their damages.

DEALING WITH THE *CHRISTENSON V. MOUNTAIN WEST FARM BUREAU MUT. INS.*²⁸ CASE

The recent (2000) *Christenson* case involved a newly acquired auto for which the owner purchased a new and separate policy with Mountain West because her daughter would be driving the car. The owner's infant granddaughter was severely injured as a passenger in the car and was covered for BI coverage under the auto's new policy. The real issue was whether the BI coverage on the owner's prior policy covering her other cars with Mountain West would include the auto under the prior policy's "after acquired vehicle" provision. The court's primary holding was that the auto was an "after acquired vehicle," so the BI coverage would apply. However, the court then dealt with the question whether the resulting BI policy coverages with Mountain West could be "stacked." The court noted the parallel between the policy's anti-stacking language in its limitation of liability clause and the language of the anti-stacking statute, MCA § 33-23-203 and held that the policies could not be stacked. The case is touted as a principal line of defense in the insurer's briefs.

Gary Zadick and Cathy Lewis make the following arguments regarding *Christenson*:

The case involved stacking of BI coverages not the personal and portable UM, UIM, and Med Pay coverages.

Multiple premiums were not paid in *Christenson* since no premium was paid for the new vehicle under the first policy.

The decision doesn't address the requirement of notice of renewal on less favorable terms of § 33-15-1106 or the notice requirement of § 33-23-203.

The decision doesn't discuss the requirement that the policy limitation be a "reasonable limitation under § 33-23-203 or the public policy that prevents an insurer from charging multiple premiums for a single coverage.

There was no discussion of the unconscionability of the policy.

The policy did not allow stacking as opposed to some that arguably do.

Kent Duckworth also challenges applicability of *Christenson* arguing that it doesn't apply where the coverage is personal portable insurance since *Christenson* involved BI coverage that is virtually never stacked.

The important thing to remember about *Christenson* is that most of the arguments described in this article were not raised there. The court simply found that the anti-stacking language of the policy involved comported with the language of the anti-stacking case and applied the statute to block stacking of BI coverage. It remains for counsel to develop the best arguments challenging the statute and the anti-stacking provisions of the policies.

CONCLUSION

The originality and creativity exhibited in the variety of arguments challenging the anti-stacking statute and its application is a testament to the seriousness with which Montana trial lawyers take their duty to represent their injured clients. It is an honor to review and summarize the persuasive advocacy of our brothers and sisters on the stacking issue. They have done us all a favor by sharing their arguments with Montana *Trial Trends* for publication and by allowing their briefs to be placed on the MTLA website. Counsel briefing a stacking issue need to thoroughly develop precise, persuasive, and credible arguments because his or her case may be the one that ends up at the Montana Supreme Court and ultimately makes the law for everyone. Given the importance of the stacking issue, counsel should notify the MTLA Amicus Committee if a case involving a stacking issue is appealed to the Montana Supreme Court. No issue could have a broader and greater financial impact on the recovery of injured persons than the issue of the legality of the anti-stacking statute.

As always, I thank Pat Sheehy and Gary Zadick for their invaluable review and comment on this article.

1. Ch. 495, L. 1997.
2. 495 P.2d 193 (Mont. 1972).
3. 601 P.2d 20 (Mont. 1979).
4. 591 P.2d 1102 (Mont. 1979).
5. Ch. 212, L. 1981, MCA § 33-23-203.
6. 924 P.2d 1315 (Mont. 1996).
7. See, for example, *Bennett v. State Farm*, 862 P.2d 1146 (Mont. 1993).
8. 601 P.2d 20 (Mont. 1979).
9. 866 P.2d 203 (Mont. 1992).
10. *Bennett*, 862 P.2d 1146.
11. 948 P.2d 700 (Mont. 1997).
12. 961 P.2d 114 (Mont. 1998).
13. 812 P.2d 347 (Mont. 1991).
14. 973 P.2d 804 (Mont. 1998).
15. 862 P.2d at 1149.
16. See, for example, *Sullivan* 495 P.2d 193.
17. Fifteenth Judicial District, Sheridan County, Cause 10913.
18. 898 P.2d 1220 (Mont. 1995).
19. 265 F.3d 931 (9th Cir. 2001).
20. 937 P.2d 45 (Mont. 1997).
21. 883 P.2d 793 (Mont. 1994).
22. 927 P.2d 1011 (Mont. 1996).
23. 713 P.2d. 495 (Mont. 1985).
24. 776 P.2d 488 (Mont. 1989).
25. 911 P.2d 1165, 1172 (Mont. 1996).
26. 911 P.2d 1165 (1999).
27. *Thomas*, 973 P.2d 804.
28. 22 P.3d 624 (Mont. 2000).